Public Prosecutor v Ismail bin Mohd Azmi and another appeal

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NOS 42–83 OF 2007 AND 42–57 OF 2008
YEOH WEE SIAM JC
8 OCTOBER 2009

Criminal Law — Anti-Corruption Act 1997 — Policeman soliciting gratification — Facts to be proved — Presumption that gratification received corruptly — Whether defence rebutted presumption

Criminal Law — Anti-Corruption Act 1997 — Whether witness was accomplice or agent provocateur — Whether witness presumed unworthy of credit — Anti-Corruption Act 1997 s 44(1)(a), (b) & (c)

Criminal Procedure — Appeal — Acquittal, against — Corruption — Whether proper evaluation of evidence by trial judge — Whether prima facie case proven by prosecution

Criminal Procedure — Appeal — Appeal against conviction and sentence — Bribery and corruption — Whether prima facie case established — Police officer soliciting and accepting bribe — Whether accused's defence bare denial and fabrication — Whether accused rebutted statutory presumption in s 42(1) of the Anti-Corruption Act 1997 — Whether sentence manifestly excessive

Evidence — Adverse inference — Failure to call witness — Whether failure drew adverse inference — Whether prosecution withheld witness — Whether witness offered to defence but defence chose not to call witness — Evidence Act 1950 ss 114(g) & 134

Evidence — Witness — Credibility of — Assessment of credibility based on demeanor — Whether accused evasive, not consistent and slow in giving answers — Whether safe and proper to rely on trial judge's assessment on accused's demeanour

A

The accused, a police officer, was charged together with another person still at large with three charges of corruptly soliciting gratification ie cash of
B RM5,000 from SP1 ('the gratification') as an inducement not to take action against SP1, who was suspected of committing an offence under the Minor Offences Act 1955 for selling fireworks and fire crackers. At the close of the case for the prosecution, the trial judge found that the prosecution had failed to prove a prima facie case against the accused in respect of the first and
C second charges. Accordingly, she acquitted the accused on the first and second charges. However, the trial judge found that the prosecution had succeeded in proving a prima facie case against the accused in respect of the third charge. She therefore called the accused to enter upon his defence. At the end of the defence case, the trial judge held that the defence did not raise any reasonable
D doubt on the prosecution case. She found the accused guilty on the third charge, convicted him and sentenced him to 12 months imprisonment and fined RM10,000 in default, six months imprisonment. The accused appealed against his conviction and sentence on the third charge. The public prosecutor appealed against the acquittal on the first and second charges. The
E accused, inter alia, claimed that adverse inference under s 114(g) of the Evidence Act 1950 ('EA') should be invoked against the prosecution for not calling one Helmi as a witness.

F **Held,** dismissing the accused's appeal:

(1) The trial judge only evaluated SP1's evidence and did not weigh it with the overall evidence of the other prosecution witnesses. The accused did not directly solicit the gratification as an inducement to settle the case,
G the demand for the gratification came from one 'boss'. However, the accused had a role in the commission of the offence right from the beginning. All that the accused did was in furtherance of the common intention ie to solicit the gratification. A prima facie case had been proved by the prosecution in respect of the first charge and the second
H charge. Accordingly, the order of acquittal and discharge was set aside and the case reverted to the sessions court for the defence to be called (see paras 39, 48 & 52)

(2) The accused's defence in relation to the third charge was not an honest explanation and the accused failed to rebut, on a balance of
I probabilities, the statutory presumption in s 42(1) of the Anti-Corruption Act 1997 ('the Act') that the money found in the accused's trousers pocket was gratification money. The defence was only a denial and a fabrication. The accused's defence was a mere afterthought (see paras 95–96).

(3) The trial judge stated that the demeanour of the accused under cross-examination was usually evasive and not consistent. There were times when the accused was slow in giving his answers. It was safe and only proper to rely on the trial judge's assessment on the accused's demeanour (see para 97).

(4) Under s 134 of the Evidence Act 1950 ('EA'), there is no requirement for a particular number of witnesses to be called. If the prosecution, after having called altogether 14 witnesses to prove its case, is confident that it can succeed in establishing a prima facie case against the accused on the relevant charge, then it was wrong to invoke s 114(g) of the EA against the prosecution for not calling Helmi as a witness. This is because the prosecution was not withholding the evidence of Helmi by not calling Helmi, but rather because the prosecution thought that it did not require Helmi's evidence. The prosecution has the discretion to conduct the case in the manner it thinks fit. The prosecution did offer Helmi as a witness to the defence but the defence chose not to call Helmi as a witness (see para 98).

(5) SP1 was not an accomplice or agent provocateur. SP1 was the victim of the offence. In any case, under s 44(1)(a)(ii) of the Act, no witness shall be regarded as an accomplice by reason only of such witness having given or agreed to give any gratification. Under s 44(1)(b) and (c) of the Act, no agent provocateur shall be presumed to be unworthy of credit, and any statement made by an agent provocateur is admissible as evidence (see para 107).

(6) The sentence was not manifestly excessive to require intervention by the court to reduce it. The accused had committed a most despicable crime. He abused his position as a police officer to victimise and put fear into a disabled shop-keeper in order to obtain corruption money. Corruption is a most heinous crime which ought to be wiped out so that business and trade in this country can flourish, and society can carry on its undertakings without being raided by police officers such as the accused (see paras 111–112).

[Bahasa Malaysia summary

Tertuduh, seorang pegawai polis, dituduh bersama dengan seorang yang lain yang masih bebas, dengan tiga tuduhan menawarkan wang suapan secara korup iaitu wang sebanyak RM5,000 daripada SP1 ('wang suapan tersebut') sebagai dorongan agar dia tidak mengambil tindakan terhadap SP1, yang disyaki melakukan kesalahan di bawah Akta Kesalahan-Kesalahan Kecil 1955 kerana menjual bunga api dan mercun. Pada penutup kes pendakwaan, hakim bicara mendapati bahawa pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh berkaitan dengan tuduhan pertama dan kedua.

Maka, beliau membebaskan tertuduh terhadap tuduhan pertama dan kedua. Walau bagaimanapun, hakim perbicaraan mendapati bahawa pendakwaan berjaya membuktikan kes prima facie terhadap tertuduh berkaitan dengan tuduhan ketiga. Beliau oleh itu memerintahkan tertuduh membela dirinya. Pada akhir kes pembelaan, hakim bicara memutuskan bahawa pembelaan tidak menimbulkan sebarang keraguan munasabah atas kes pendakwaan. Beliau memutuskan tertuduh bersalah atas tuduhan ketiga, mensabitkan dan menghukumnya 12 bulan penjara dan denda sebanyak RM10,000 dan jika gagal membayar denda, enam bulan penjara. Tertuduh merayu terhadap sabitan dan hukuman atas tuduhan ketiga tersebut. Pendakwa raya merayu terhadap pembebasan tuduhan pertama dan kedua. Tertuduh, antara lain, mendakwa bahawa inferens yang menetang di bawah s 114(g) Akta Keterangan 1950 ('AK') harus diguna pakai terhadap pendakwaan kerana tidak memanggil Helmi sebagai saksi.

Diputuskan, menolak rayuan tertuduh:

(1) Hakim bicara hanya meneliti keterangan SP1 dan tidak menimbangkannya bersama dengan keterangan saksi-saksi pendakwaan yang lain. Tertuduh tidak secara terang-terangan menawarkan wang suapan tersebut sebagai dorongan untuk menyelesaikan kes tersebut, desakan untuk wang suapan tersebut datangnya daripada seorang 'boss'. Walau bagaimanapun, tertuduh memainkan peranan dalam perlakuan kesalahan tersebut dari mula lagi. Apa yang dilakukan oleh tertuduh ialah bagi mencapai niat yang sama iaitu menawarkan wang suapan tersebut. Prima facie kes telah dibuktikan oleh pihak pendakwaan berkaitan dengan tuduhan pertama dan kedua. Oleh itu, perintah pembebasan dan pelepasan diketepikan dan kes tersebut dikembalikan ke mahkamah sesyen untuk pembelaan dipanggil (lihat perenggan 39, 48 & 52).

(2) Pembelaan tertuduh berkaitan tuduhan ketiga bukanlah satu penjelasan yang jujur dan tertuduh gagal mematahkannya, atas imbangan kebarangkalian, anggapan statutori s 42(1) Akta Badan Pencegah Rasuah 1997 ('Akta tersebut') bahawa wang yang dijumpai dalam poket seluar tertuduh adalah wang suapan tersebut. Pembelaannya hanyalah penafian semata-mata dan suatu rekaan. Pembelaan tertuduh hanyalah sesuatu yang difikirkan kemudian (lihat perenggan 95–96).

(3) Hakim bicara menyatakan bahawa perilaku tertuduh semasa pemeriksaan balas biasanya bersifat mengelak dan tidak konsisten. Ada kalanya tertuduh memberikan jawapannya lambat-lambat. Adalah selamat dan betul untuk bergantung kepada penilaian hakim bicara atas perilaku tertuduh (lihat perenggan 97).

(4) Di bawah s 134 AK, tiada keperluan untuk bilangan saksi yang perlu dipanggil. Jika pihak pendakwaan, setelah memanggil kesemua 14 saksi untuk membuktikan kesnya, yakin bahawa ia boleh membuktikan kes prima facie terhadap tertuduh terhadap tuduhan yang berkenaan, maka adalah salah apabila mengguna pakai s 114(g) AK terhadap pendakwaan disebabkan tidak memanggil Helmi sebagai saksi. Pihak pendakwaan mempunyai budi bicara dalam menjalankan kes ini sebagaimana yang difikirkannya patut. Pihak pendakwaan telah menawarkan Helmi sebagai saksi kepada pihak pembelaan tetapi pihak pembelaan yang tidak memanggil Helmi sebagai saksinya (lihat perenggan 98).

(5) SP1 bukanlah rakan subahat atau ejen perangkap. SP1 merupakan mangsa kesalahan tersebut. Dalam apa jua kes, di bawah s 44(1)(a)(ii) Akta tersebut, tiada saksi harus dianggap sebagai rakan subahat hanya dengan alasan saksi tersebut telah memberi atau setuju memberi wang suapan. Di bawah s 44(1)(b) dan (c) Akta, tiada ejen perangkap harus dianggap tidak boleh dipercayai, dan sebarang pernyataan yang dibuat oleh ejen perangkap boleh diterima sebagai keterangan (lihat perenggan 107).

(6) Hukuman tersebut tidaklah keterlaluan untuk membolehkan campur tangan mahkamah untuk peringanan. Tertuduh telah melakukan jenayah yang keji. Dia menyalahgunakan kedudukannya sebagai pegawai polis untuk menindas dan menakutkan pemilik kedai yang cacat bagi mendapatkan wang rasuah. Rasuah merupakan jenayah keji yang harus dihapuskan supaya perniagaan dan perdagangan di negara ini maju, dan masyarakat boleh menjalankan usaha-usaha mereka tanpa serbuan oleh pegawai-pegawai polis seperti tertuduh (lihat perenggan 111–112).]

Notes

For a case on Anti-Corruption Act 1997 in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 18.

For a case on conviction and sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 176.

For cases on acquittal against appeal, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 141–162.

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2689–2705.

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 172–189.

Cases referred to

Abd Khalid bin Abd Hamid v PP [1995] 1 MLJ 692; [1994] 1 LNS 182, HC (refd)

PP v Chan Kit Tong Sally [1991] 1 MLJ 358; [1991] 1 CLJ 396 (Rep), SC (refd)
PP v Dato' Waad bin Mansor [2005] 2 MLJ 101; [2005] 1 CLJ 421, FC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576; [1992] 3 CLJ 408 (Rep); [1992] 4 CLJ 2028, HC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466, CA (refd)
Suresh v State of Uttar Pradesh AIR 2001 SC 1344 (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 11(a), 42(1), 44(1)(a)(ii), (iii), (b), (c)
Evidence Act 1950 ss 114(g), 134
Minor Offences Act 1955
Penal Code s 34

Saiful Hazmi bin Mohd Saad (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the prosecution.
Salim bin Bashir (Salim bin Bashir Bhaskaran) for the accused.

Yeoh Wee Siam JC:

[1] These appeals are in respect of the decision of the learned Petaling Jaya Sessions Court judge ('the trial judge') in the Petaling Jaya Sessions Court arrest case No 61–5 of 2003.

[2] Ismail bin Mohd Azmi ('the accused') was charged with the following three charges as follows:

Pertuduhan Pertama

> Bahawa kamu bersama-sama dengan seorang yang masih bebas pada 25 Disember 1999 lebih kurang jam 9 malam, bertempat di tepi lebuh raya Damansara-Puchong berdekatan dengan Sekolah Tamil, Batu 11, Puchong di dalam Daerah Petaling, dalam Negeri Selangor, sebagai ejen Kerajaan Malaysia iaitu Konstabel Polis yang bertugas di Cawangan Kem Komandan, Pusat Latihan Polis, Jalan Semarak, Kuala Lumpur, telah secara rasuah meminta suatu suapan daripada Shieh Chin You untuk diri kamu iaitu wang sebanyak RM5,000 sebagai dorongan untuk tidak mengambil tindakan terhadap Shieh Chin You yang disyaki melakukan kesalahan di bawah Akta Kesalahan-Kesalahan Kecil 1955 (Akta 336) kerana menjual bunga api dan mercun, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 10(a)(bb) Akta Pencegahan Rasuah 1997 (Akta 575) yang boleh dihukum di bawah s 16 Akta yang sama dan dibaca bersama-sama dengan s 34 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu bersama-sama dengan seorang yang masih bebas pada 25 Disember 1999 lebih kurang jam 9 malam, bertempat di tepi lebuh raya Damansara-Puchong berdekatan dengan Sekolah Tamil, Batu 11, Puchong, di dalam Daerah Petaling, dalam Negeri Selangor, sebagai ejen Kerajaan Malaysia iaitu Konstabel Polis yang bertugas di Cawangan Kem Komandan, Pusat Latihan Polis, Jalan Semarak, Kuala Lumpur, telah secara rasuah memperoleh daripada Shieh Chin You untuk diri kamu wang sebanyak RM1,000 sebagai dorongan untuk tidak mengambil tindakan terhadap Shieh Chin You yang disyaki melakukan kesalahan di bawah Akta Kesalahan-Kesalahan Kecil 1955 (Akta 336) kerana menjual bunga api dan mercun, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 11(a) Akta Pencegahan Rasuah 1997 (Akta 575) yang boleh dihukum di bawah s 16 Akta yang sama dan dibaca bersama-sama dengan s 34 Kanun Keseksaan.

Pertuduhan Ketiga

Bahawa kamu bersama-sama dengan seorang yang masih bebas pada 29 Disember 1999 lebih kurang jam 3 petang, bertempat di No 24, Lorong 2A, Batu 13 1/2 Rancangan Rumah Murah PKNS, Puchong, di dalam Daerah Petaling, dalam Negeri Selangor, sebagai ejen Kerajaan Malaysia iaitu Konstabel Polis yang bertugas di Cawangan Kem Komandan, Pusat Latihan Polis, Jalan Semarak, Kuala Lumpur, telah secara rasuah memperoleh daripada Shieh Chin You untuk diri kamu iaitu wang sebanyak RM2,000 sebagai dorongan untuk tidak mengambil tindakan terhadap Shieh Chin You yang disyaki melakukan kesalahan di bawah Akta Kesalahan-Kesalahan Kecil 1955 (Akta 336) kerana menjual bunga api dan mercun, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 11(a) Akta Pencegahan Rasuah 1997 (Akta 575) yang boleh dihukum di bawah s 16 Akta yang sama dan dibaca bersama-sama dengan s 34 Kanun Keseksaan.

[3] At the close of the case for the prosecution, the trial judge found that the prosecution had failed to prove a prima facie case against the accused in respect of the first and second charges. Accordingly, she acquitted the accused on the first and second charges.

[4] However, the trial judge found that the prosecution had succeeded in proving a prima facie case against the accused in respect of the third charge. She therefore called the accused to enter upon his defence.

[5] At the end of the defence case, the trial judge held that the defence did not raise any reasonable doubt on the prosecution case. She found the accused guilty on the third charge and convicted him. The accused was sentenced to twelve months imprisonment and fined RM10,000 in default six months imprisonment. Learned counsel for the accused applied for stay of execution. The trial judge allowed stay of execution for the sentence of

imprisonment based on the existing bail of RM10,000. However, the trial judge did not allow stay of execution for the fine of RM10,000.

CRIMINAL APPEAL NO 42–83 OF 2007

[6] These are the two appeals filed by the public prosecutor in respect of the acquittal and discharge of the accused on the first and second charges.

CRIMINAL APPEAL NO 42–57 OF 2008

[7] This is the appeal of the accused in respect of his conviction and sentence on the third charge.

[8] There is no cross-appeal filed by the public prosecutor regarding the sentence in respect of the third charge.

[9] I heard the appeals in both cases on 30 September 2009 and I gave my oral judgment on the same day.

[10] In this judgment, I will consider the two appeals of the public prosecutor first before considering the accused's appeal. However, the facts for the first and second charges are also applicable to the third charge.

CRIMINAL APPEAL NO 42–83 OF 2007

[11] Briefly, the facts for the first, second and third charges as adduced through the evidence of the prosecution witnesses are as follows:

[12] On 25 December 1999 at about 9.30pm, the complainant, Sheih Chin You or 'SP1', was carrying on his business at No 24, Lorong 2A, Bt 13 1/2, Rancangan Rumah Murah PKNS, Puchong, Petaling district, four male persons ie someone who looked like an Indian ('the Indian man') and three Malays entered SP1's shop. The Indian man was Raja Maidin, also known as 'Black'. The three Malay men were the accused, SP11 and SP13. All the four of them were in plain clothes but they showed their police authority cards and stated that they were police officers. They started taking fireworks from the back of the counter of SP1's shop, and asked for the identity cards of SP1 and his family. SP1 showed his identity card and admitted that the fireworks belonged to him.

[13] After that, the Indian man said 'lokap dia'. One of the Malay men wanted to handcuff SP1 but SP1's wife, ie SP2, did not allow it because SP1 is a disabled person and could not walk without a walking stick. The accused

then said 'tak payah gari' and directed SP1 to follow them. SP1 identified the accused as one of the four persons who came to his shop.

[14] SP1 followed the four men in their red Ford Laser car, registration No CT 1373, which was parked outside SP1's shop. All the four men also entered the car. SP1 sat at the back of the car, in between the accused and SP13. SP11 drove the car. The Indian man sat at the front passenger seat. SP1 stated that they were heading towards Kuala Lumpur.

[15] During the journey, the four men were just talking and frightening SP1. The accused said 'curi ayam, curi telur, sama saja'. They also said that SP1 would be fined RM10,000. They always asked 'apa macam, apa macam'. The Indian man also said 'jangan main-main sebab dia ada pistol'.

[16] After that, the Indian man used his hand telephone to call his 'boss' and gave the telephone to SP1. According to SP1, the person on the line asked SP1 'berapa boleh kasi untuk selesai?'. SP1 replied 'RM300' but the person on the line asked for RM5,000. SP1 replied that he did not have so much money but the person on the line told SP1 he still wanted RM5,000 and asked SP1 to make his own arrangement for the money. SP1 said that he would pay RM1,000. The person on the line agreed and asked SP1 to pay the balance of the money later.

[17] After that, SP1 gave the hand telephone back to the Indian man who then spoke to his 'boss'. The Indian man next asked SP1 'macam mana?'. The car stopped at in front of Sekolah Tamil Puchong at the Puchong Highway ('the school'). SP1 told the four men that he would tell his wife to bring the RM1,000. SP1 borrowed the Indian man's hand telephone and called his wife to bring the RM1,000 and told her to come to the place where the car was parked.

[18] Not long after that, SP1's wife, ie SP2, came with their son. SP2 was driving their car. SP1 went out of the red Ford Laser car and got into his car and sat at the driver's seat. SP1's wife got out from the same car and sat at the front passenger seat. The Indian man went into the car and sat at the back passenger seat behind SP1. The three Malay men went outside the red Ford Laser car. Then SP1 took the money from his wife, counted it, and gave it to the Indian men. According to SP1, the three Malay men did not see SP1 handing over the money to the Indian man. After that, SP1 was directed to leave the place.

[19] On 27 December 1999 at about 11am, a male person called SP1 at his provision shop. SP1's mother answered the call. SP1 informed his mother that he would not be at the shop and asked the caller to call him at his hand

telephone No 010–2705851. After about a minute, SP1's hand telephone sounded and a call came from telephone No 019–3647456. The line got cut off. At about 12.30pm. SP1 received a second call from telephone No 019–3647456. The male person asked for the balance of payment of RM4,000. When SP1 replied that he did not have the money, the male person on the line got angry and said 'barang-barang ada dengannya, bila-bila masa pun dia boleh lokap SP1' and SP1 just kept quiet and the line got cut off.

[20] At about 2pm on the same day, SP1 got a call from the same telephone number. The male person on the line was very angry and said 'jangan main-main'. At that time, SP1 was already at the office of the Anti-Corruption Agency ('the ACA'). The ACA Selangor asked SP1 to come back the next day since the officer concerned was not in the office.

[21] At about 7.30pm on the same day, SP1 received a call from the same number. The male person said that he would come that same night to lock up SP1. SP1 told the male caller that he was then in Seremban, Negeri Sembilan.

[22] On the next day, 28 December 1999, at about 9am, SP1 and his wife went to the office of the ACA Selangor ('the ACA office') to make a complaint ('P2') regarding the demand for bribe by the four men. After that, SP1 and SP2 were told to go back to their shop.

[23] At about 10am, on the same day, an ACA officer, SP5, came to the shop to look at the place, both inside and outside the shop. After that, SP1 was brought back to the ACA office.

[24] When they arrived at the ACA office, SP1 was directed to telephone the number 019–3647456. The telephone conversation was successfully recorded by SP5. In the telephone conversation, SP1 asked for the payment to be reduced to RM2,000. The male person who replied SP1's call said 'cannot' and that he would speak to his head. The male person also agreed to come and take the money at 3pm that same day.

[25] After the recording of the telephone conversation, SP1 was brought to a meeting room to attend a briefing on a trap to be laid in SP1's shop at 3pm that same day. SP1 was instructed to take off his spectacles and say 'ok' after handing over the money to the target.

[26] SP1 then went back to his shop. He was given the trap money of RM2,000. After three hours, the targeted person did not come so the trap was cancelled. SP1 gave back the RM2,000 to the ACA officer.

[27] During that same night, SP1 received a telephone call from No 019–3647456. SP1 scolded the caller for not coming to take the money. SP1 then asked the caller to come and take the money on the next day at 3pm. SP1 later called SP4 and informed him of the previous telephone call. SP4 told SP1 that at about 12 noon on the next day, 29 December 1999, the ACA officers would come to SP1's shop.

[28] On 29 December 1999 at about 12 noon, three ACA officers came to SP1's shop. Three other ACA officers ie SP5, SP6 and one more person would observe from inside their car parked not far from SP1's shop. SP3, SP7 and one more ACA officer went into SP1's shop. SP3, witnessed by SP7, handed over to SP1 the marked notes for RM2,000 ie 40 notes of RM50 each ('P4', 1–40). SP1, SP3 and SP7 signed on the money list ('P3').

[29] After that, SP3, SP7 and one more ACA officer took their places in the kitchen at the back of SP1's shop to observe. At about 2.30pm, SP1 received a call from the same number and the caller told SP1 that he would be arriving at SP1's shop in about 1/2 hour's time. SP1 informed this to the three ACA officers who were in the kitchen. SP3 then informed this to SP5 who was observing from the car. When SP3 was talking to SP5, he saw a big sized male person wearing a black T-shirt, without collar, and blue jeans entering the shop. The male person asked SP1 'apa macam'. SP1 asked the male person whether his other friends knew and the male person said they knew. When he was asked how many came, the male person said two persons. The male person told SP1 that if anyone were to disturb SP1, SP1 could telephone him. After counting the money, SP1 handed over the RM2,000 to the male person who put the money into the right pocket of his trousers. The male person said 'thank you'. SP1 identified the male person who took the money as the accused. SP1 could also identify the accused's voice as the same voice of the caller on the telephone. When the money was handed over to the accused, SP1's wife, SP2, was next to SP1. SP2 could see clearly the transaction of handing over of the money by SP1 to the accused. SP2 could identify the male person as the accused. SP3 and SP7 who were in the kitchen also saw the accused entering the shop and meeting SP1. SP3 and SP7 also identified the accused as the person who came into SP1's shop.

[30] After that, SP1 took off his spectacles and said loudly and clearly 'ok'. The accused then went out from SP1's shop and got into a silver Kancil car. SP1 asked the ACA officers to chase the accused's car. SP1 drove his car together with SP7 and one more ACA officer. SP3 got into another car driven by an ACA officer together with SP5 and SP6.

[31] When SP1 reached the junction at the main road, he saw the silver Kancil car parked by the side of a fruit stall. The accused was seen

telephoning by the side of the stall. SP1 informed the ACA officer in his car that that male person was the one who took the money from him. SP1 stopped his car and SP7 got down and went towards the accused. SP7 asked the accused if he was a police officer and the accused admitted that he was a police officer. SP7 straightaway introduced himself as an ACA officer and detained the accused. The accused tried to get away and a struggle occurred between the accused and SP7 until both fell down. After that, the other ACA officers arrived at the place. With the assistance of SP5 and one more ACA officer, the accused was then detained.

[32] SP7 asked the accused where he kept the money. The accused said that the money was in the car. SP5, SP7 and one more ACA officer and the accused went to the silver Kancil car and examined the car but could not find anything. The accused was asked again where he kept the money and the accused said that the money was with him. SP5 searched the accused's body and found the money inside the pocket of the accused's trousers. SP5, with assistance from another ACA officer, checked the money and compared it with the serial number of the marked notes in the money list in P3. He found that they were the same. After that, SP5 and the accused each signed on P7 ('A-B'). The accused was brought back to the ACA office at about 4pm. SP5 handed over all the marked notes ('P4', 1–40) to the investigating officer ('IO'), SP14.

FIRST CHARGE

[33] The trial judge rightly summed up the ingredients of the offence in the first charge as follows:

(i) the accused was an agent of the Government of Malaysia ie he was a police officer with Polis DiRaja Malaysia ('PDRM');

(ii) the accused, together with one other person still at large, corruptly solicited gratification ie cash of RM5,000 from SP1; and

(iii) the gratification was solicited as an inducement not to take action against SP1, who was suspected of committing an offence under the Minor Offences Act 1955 for selling fireworks and fire crackers.

Ingredient (i)

[34] I agree with the trial judge that regarding the first ingredient of the offence, it is not an issue. SP9 confirmed that the accused was a police officer at Cawangan Narkotik, IPD Dang Wangi, Kuala Lumpur. The accused commenced his service with the PDRM on 1 March 1997 with No R/F 131113. At the time of the incident, the accused was serving at PULAPOL, Jalan Semarak, Kuala Lumpur. SP9 was the officer responsible for keeping the

records of the police officers at IPD, Dang Wangi, Kuala Lumpur. SP9 also prepared the statement regarding the position of the accused ('P12'). A

Ingredients (ii) and (iii)

[35] The trial judge held that ingredients (ii) and (iii) of the offence in the first charge had not been proved by the prosecution for the following reasons: B

[36] SP1's evidence showed that the Indian man, Black, had the active role of threatening and frightening SP1. The accused, SP11 and SP13 only followed and added to Black's threats to SP1. SP1 stated that it was Black who said that he had a pistol and told SP1 'jangan main-main dengannya'. Black said 'berapa, berapa' dan 'macam mana, berapa'. Black also telephoned a person, purportedly his 'boss', and asked SP1 to talk to his 'boss'. The 'boss' was the one who asked for the RM5,000 from SP1 to settle SP1's case. SP1 then discussed with the same 'boss' through the telephone where finally it was agreed that SP1 would pay RM1,000 first and the balance to be paid later. C D

[37] The trial judge therefore found that the asking of the money was done by the 'boss' with an active role carried out by Black as a middleman. The trial judge stated that there was no evidence of the accused being involved in the discussion to reduce the payment and other related matters. The telephone conversation was between Black and the 'boss' and SP1. The trial judge further stated that even though the accused was together with them from the time they entered SP1's shop until they got into the car and went near the school, the accused did not solicit the gratification of RM5,000 from SP1. The trial judge stated that even though the accused had said 'curi ayam, curi telur, sama saja', the accused did not clearly ask for the RM5,000 from SP1. E F

[38] With respect, I totally disagree with decision of the trial judge regarding ingredients (ii) and (iii) of the offence in the first charge for the following reasons: G

[39] The trial judge only evaluated SP1's evidence and did not weigh it with the overall evidence of the other prosecution witnesses ie SP2, SP11 and SP13. H

[40] The trial judge erroneously held that common intention was not proved. Section 34 of the Penal Code provides as follows: I

> Where a criminal Act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[41] In *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; [1992] 3 CLJ 408 (Rep); [1992] 4 CLJ 2028, Visu Sinnadurai J held as follows:

> The scope of s 34 of the Penal Code is well understood: where two or more persons act, in furtherance of a common intention to commit an act, all such persons may be charged together for the commission of the same offence, even though only one of them actually committed the physical act which resulted in the commission of the offence.

[42] In *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466, Gopal Sri Ram JCA, in relation to common intention cited *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344 where Sethi J, speaking for himself and Agrawal J, said:

> Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention ... a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such a plan must precede the act constituting an offence .... The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

[43] Thus, even though Black was the one actively threatening SP1 and talking to his 'boss' for the demand of the RM5,000 to be made, the fact remains that the accused did not dissociate himself from whatever Black was doing. The evidence shows that the accused was one of the four men who entered the shop. All the four men acted with a common intention. They came to SP1's shop and they wanted to examine SP1's shop. They introduced themselves as police officers. SP2 testified that the Accused then seized the fireworks which were placed behind the counter. SP2 also stated that when Black wanted to 'lokap' SP1, the accused wanted to handcuff SP1. When all the four men took SP1 to go into their car, purportedly to the police station, they also took a black plastic bag containing the fire crackers.

[44] According to SP8, only a police inspector could inspect SP1's premises if SP1 had indeed committed an offence. The four men, including the accused, had no authority to inspect SP1's premises.

[45] SP13 testified that while in the car, on their way to SP1's shop, he heard Black saying that he wanted to carry out an operation in one of the shops (appeal record at pp 179–180).

[46] The evidence shows that Black wanted to conduct an illegal operation on SP1's shop. None of the other three men, including the accused, disagreed. They all went along with Black. This proves that all the four men developed the common intention on the spot to commit the offence.

[47] SP1 was not brought by the four men to the police station that night. Instead, he was asked to get into SP11's car. Inside the car, Black started his discussion with SP1. All four of them tried to frighten SP1 and SP1 was told that he would be fined RM10,000. The accused even said 'curi ayam dan curi telur sama saja', to frighten SP1. The accused also interrupted and chipped in, in Black's discussion with SP1 and the 'boss'.

[48] It is true that the accused did not directly solicit the gratification of RM5,000 from SP1 as an inducement to settle the case regarding the sale of the fireworks. The demand for RM5,000 came from the 'boss' after Black contacted the 'boss'. However, the accused had a role in the commission of the offence right from the beginning. He was acting as a cohort of Black in the 'operasi haram' by seizing the fireworks and frightening SP1. All that the accused did was in furtherance of the common intention ie to solicit gratification of RM5,000 from SP1 as stated in the charge.

[49] SP11 also gave some supporting evidence. He stated that the accused was guarding SP1 in the car and always adding on to what Black threatened SP1 with (appeal record at p 153).

[50] The third ingredient can be proved by relying on s 42(1) of the Anti-Corruption Act 1997 ('the Act').

[51] From the above, it is clear that ingredients (ii) and (iii) of the first charge were proven by the prosecution. The trial judge had misdirected herself and had erred in fact and law.

[52] I am satisfied that a prima facie has been proved by the prosecution in respect of the first charge. Accordingly, I set aside the order of acquittal and discharge regarding the first charge, and ordered that the case be reverted to the sessions court for the defence to be called.

SECOND CHARGE

[53] The trial judge rightly held that ingredients (i) and (iii) of the second charge are the same as those of the first charge. However, in respect of the second ingredient, it must be proved that the accused and Black received the gratification of RM1,000 from SP1.

[54] The trial judge held that the second and third ingredients of the offence were not proved for the following reasons:

[55] When SP1's wife, 'SP2', came near the school in her car, SP1 got out from the red Ford Laser car and went into SP2's car. He was followed by Black who went into SP2's car and sat behind SP1. At that time, the accused was outside the red Ford Laser car. The trial judge stated that when the RM1,000 was handed over to Black by SP1 inside SP2's car, there is no evidence to show that the accused was involved in the handing over of that money. According to SP13, Black gave SP13 RM200 on the way back. The trial judge stated that it was Black, and not the accused, who gave the money to SP13.

[56] The trial judge concluded that there was no common intention on the accused's part. The accused did not ask for or received the RM1,000. It was Black who played the active role to get the RM1,000 from SP1. The trial judge was of the view that the role of the accused in seizing the fireworks from SP1's shop and saying 'curi ayam, curi telur sama saja' and following the rest to the school was not sufficient to prove that the accused had a common intention to solicit and receive the gratification from SP1.

[57] With respect, here again I totally disagree with the trial judge regarding her findings on the second and third ingredients of the second charge for the following reasons as submitted by the prosecution:

[58] The trial judge relied mainly on the evidence of SP1 without taking into account the evidence of SP2, SP11, SP13 and also circumstantial evidence in order to ascertain whether the accused did receive the RM1,000 from SP1.

[59] It is true that there is no direct evidence of the accused receiving the RM1,000 from SP1.

[60] In *Abd Khalid bin Abd Hamid v Public Prosecutor* [1995] 1 MLJ 692; [1994] 1 LNS 182, Zaleha Zahari JC (as she then was) held:

> In cases like this, where the evidence is circumstantial, what has to be considered is to consider not only each piece of evidence but the combined strength of these strands when twisted together, whether the various circumstances to which they spoke pointed irresistibly in one direction and one direction only, the direction being the appellant.

[61] As enumerated earlier for the first charge, the accused was involved in the demand for the gratification of RM5,000 made by Black which led to Black receiving the RM1,000 from SP1.

[62] The accused's involvement before and after Black received the RM1,000 can be seen through the evidence of SP1, SP2, SP11 and SP13 as follows:

[63] Before SP2 came to where SP11's car was parked in front of the school ('the place of the incident'), Black had contacted SP2 for SP1. SP1 told SP2 to bring the RM1,000. At the place of the incident, SP11 and SP13 were in front of the red Ford Laser car, smoking. The accused, SP1 and Black were at the back of the car, discussing (see the appeal record at p 151).

[64] Immediately when SP2 arrived, the accused stood behind the red Ford Laser car. Black went into SP2's car and sat behind SP1. At that point, SP1 handed over the RM1,000 to Black. The accused then was standing behind the red car and looking all around (see SP2's and SP13's evidence in the appeal record at pp 63 and 184 respectively).

[65] By the fact that the accused was standing behind the red car but in front of SP2's car, it shows that he could see whatever was happening in SP2's car when SP1 was handing over the RM1,000 to Black. The accused did not do anything. He did not stop SP1 from handing over the RM1,000 to Black. Neither did he stop Black from receiving the RM1,000 from SP1. The accused was a police officer, but he did not protest against Black's action in receiving the gratification of RM1,000 from SP1. All this shows that the accused acted with a common intention with Black.

[66] The prosecution also posed a very pertinent question. If the accused was not involved in the demand for gratification on 25 December 1999, then why did he himself go on 29 December 1999 to collect the gratification?

[67] SP11 also testified that the accused told SP11 and Black in the car that this is a fireworks project and if they could catch the Chinese man then 'boleh kowtim duit'.

[68] The third ingredient of the charge can be proven by relying on the presumption in s 42(1) of the Act.

[69] Based on the above, I am of the opinion that the trial judge had misdirected herself and had erred in fact and in law in holding that the second and third ingredients of the second charge had not been proved.

A **[70]** I am satisfied that a prima facie case has been proved by the prosecution in respect of the second charge. Accordingly, I set aside the order of acquittal and discharge regarding the second charge, and ordered that the case be reverted to the sessions court for the defence to be called.

B CRIMINAL APPEAL NO 42–57 OF 2008

Whether a prima facie case has been proved

C **[71]** The trial judge rightly held that ingredients (i) and (iii) of the third charge are the same as ingredients (i) and (iii) for the first and second charges.

[72] The first ingredient is as stated earlier.

D **[73]** As for the second ingredient, it has to be proved that the accused, together with a friend still at large, had solicited gratification of RM2,000 from SP1.

E **[74]** Here, the trial judge is correct in her findings that the prosecution had proved a prima facie case against the accused based on the following evidence:

[75] On 29 December 1999, a trap was laid in SP1's shop. After the RM1,000 was handed over on 25 December 1999 near the school, SP1 was **F** contacted by a male person using telephone No 019–647456 on 27 December 1999, 28 December 1999 and 29 December 1999 asking about payment of the balance of money.

G **[76]** As agreed in the telephone conversation, a person, whom SP1 identified as the accused, came to SP1's shop on 29 December 1999 at about 2.30pm. The accused told SP1 that he came with a friend. However, only the accused alone entered SP1's shop.

H **[77]** SP1 handed over the money ie RM2,000 to the accused. SP1 saw the accused keeping the money in the pocket of his trousers. After saying 'thank you', the accused went out of SP1's shop and went off in a silver Kancil car. According to SP1, the accused's voice is the same as the voice of the caller who had telephoned SP1 several times.

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[78] After that, the accused was arrested by the ACA officers near the fruit stall. The money, RM2,000, was found inside the pocket of the accused's trousers. The money is similar to the marked notes given by the ACA officers to SP1.

[79] The trial judge stated that the defence tried to rebut the evidence that the accused took the money by suggesting that someone else ie another male person handed over the money to the accused. However, the trial judge did not believe that because, according to her, the person, who purportedly came with the accused, did not enter SP1's shop. Therefore, the trial judge was certain that it was the accused who received the gratification of RM2,000 from SP1.

[80] When SP1 handed over the RM2,000 to the accused, SP1's wife, ie SP2, was also there and she saw the transaction. SP3 and SP7 saw the accused coming into SP1's shop and meeting SP1. SP3 and SP7 also saw SP1 taking off his spectacles and said 'ok' to indicate that the money had been handed over to the accused.

[81] The trial judge found that the RM2,000 was taken as an inducement not to take action against SP1 who was suspected to have committed an offence under the Minor Offences Act 1955 for selling fireworks and fire crackers.

[82] The trial judge linked the offence to the incident on 25 December 1999 when the accused and three others came to SP1's shop and seized the fireworks and fire crackers from behind SP1's shop counter. She was of the opinion that the receipt of the RM2,000 was a follow-up from the initial seizure of the fireworks and fire crackers from SP1's shop where later RM1,000 was given to Raja Maidin or Black on 25 December 1999, followed later by several telephone calls to SP1 asking for the balance of the money to be paid.

[83] Apart from what the trial judge stated, I also considered SP11's evidence that was highlighted by the prosecution in their submissions before me. According to SP11, on their way back to Kuala Lumpur in the car on 25 December 1999, Black and the accused did talk about what happened. SP11 stated 'OKT cakap ini satu projek bunga api, kita tangkap lelaki Cina itu dan boleh kowtim duit' (appeal record at p 153). SP11 also stated 'OKT ada cakap, dia minta RM4,000 tapi lelaki Cina itu tidak ada duit sebanyak itu dan ada RM1,000. OKT ada kata, kita ada janji dengan lelaki Cina dan akan dapat RM3,000 lagi. Segala urusan OKT dan Black yang akan uruskan'.

[84] The trial judge also found that the RM2,000 received by the accused from SP1 were the same marked notes given to SP1 by the ACA officers ('P4', 1–40). She therefore rightly invoked the presumption in s 42(1) of the Act. The onus is on the accused to rebut the presumption on a balance of probabilities.

[85] Learned counsel for the accused submitted that the prosecution could not prove that the telephone No 019–3647456 belonged to the accused. That is true. The prosecution should only show that it was a prepaid number but the owner is unknown. Be that as it may, the fact remains that SP1 recognised the voice of the caller as that of the accused and he confirmed it after the accused was arrested.

[86] Based on the above, the trial judge held that all the ingredients of the third charge had been proved by the prosecution. The trial judge was correct in her decision to call the accused to enter upon his defence.

Whether the defence has raised any reasonable doubt in the prosecution case

[87] The accused decided to give his evidence on oath. He was the sole witness for the defence case.

[88] Briefly, the defence is as follows:

[89] On 29 December 1999, the accused was invited by a friend called Helmi who had a direction from his 'boss' to go to SP1's shop to collect something for the 'boss'. The accused did not know who the 'boss' was, only Helmi knew. Helmi told the accused not to ask too much. According to Helmi, he knew where the shop was because he had previously followed the accused, Black, SP11 and SP13 there on 25 December 1999.

[90] Before arriving at SP1's shop, Helmi made a telephone call to someone and informed the person that he would be arriving at 3pm.

[91] When they arrived at SP1's shop, Helmi directed the accused to enter the shop to meet SP1, whilst Helmi waited in the car. The accused then went into SP1's shop and asked SP1 whether the 'boss' had telephoned. SP1 replied 'yes', and gave the accused an envelope.

[92] When he came out of SP1's shop, the accused entered Helmi's car and handed over the envelope to Helmi. Helmi tore the envelope and took out RM2,000 and gave it to the accused to keep for the purpose of buying fruits. The accused kept the money in the pocket of his trousers. The accused stated that he did not know that the RM2,000 was gratification money.

[93] After that, Helmi drove the car and stopped near a fruit stall. A male person in plain clothes came and pulled the accused's shirt without saying anything. Then several male persons came and detained the accused and handcuffed him. The accused shouted for help from Helmi but Helmi had

already ran away. The accused only knew that these male persons were ACA officers after he was detained. The ACA officers asked the accused about the money taken from SP1's shop and the accused informed them that it was in the pocket of his trousers. The accused repeatedly informed the ACA officers that he did not know anything and that they should ask Helmi.

[94] The accused stated that he did not ask for the gratification from SP1 and he did not telephone SP1 for it. Neither did he take any gratification from SP1. The accused maintained that he only entered SP1's shop to take the boss' thing ('barang boss') on Helmi's direction.

[95] The trial judge stated that she observed the demeanour of the accused when he was giving evidence. She found that the accused's defence was not an honest explanation and the accused failed to rebut, on a balance of probabilities, the statutory presumption in s 42(1) of the Act that the money found in the pocket of the accused's trousers was gratification money.

[96] I agree with the trial judge's decision that the defence was only a denial and a fabrication. What the accused stated in his defence was a mere afterthought.

[97] The trial judge stated that the demeanour of the accused under cross-examination was usually evasive and not consistent. There were times when the accused was slow in giving his answers. I did not have the benefit of hearing the accused at first instance. As an appellate judge, in the absence of any good reason to the contrary, I think it is quite safe and only proper to rely on the trial judge's assessment on the accused's demeanour.

[98] The accused did not call Helmi as a witness. Learned counsel for the accused submitted that the adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the prosecution for not calling Helmi as a witness. With respect, I do not agree. Under s 134 of the Evidence Act 1950, there is no requirement for a particular number of witnesses to be called. If the prosecution, after having called altogether 14 witnesses to prove its case, is confident that it can succeed in establishing a prima facie case against the accused on the relevant charge, then it would be wrong to invoke s 114(g) of the Evidence Act 1950 against the prosecution for not calling Helmi as a witness. This is because the prosecution is not withholding the evidence of Helmi by not calling Helmi, but rather because the prosecution thinks that it does not require Helmi's evidence. The prosecution has the discretion to conduct the case in the manner it thinks fit. I note that the prosecution did offer Helmi as a witness to the defence. For reasons best known to the defence, the defence chose not to call Helmi as a witness. The failure of the accused to call Helmi as a witness has to a large extent

A contributed to the accused's failure to rebut the presumption under s 42(1) of the Act that he did not corruptly accept the RM2,000 from SP1 as an inducement for not taking action against SP1 for the offence of selling fireworks and fire crackers in contravention of the Minor Offences Act 1955.

B **[99]** The accused's story that he went to SP1's shop with Helmi does not appear to be credible. If indeed Helmi was inside the car and then ran away when the ACA officers came to arrest the accused, then why was this not mentioned by the prosecution witnesses, or put to the prosecution witnesses during their cross-examination? To my mind, the accused was just cooking up C the story and shifting the whole blame onto Helmi. I do not think that the accused is a truthful witness. As the trial judge had stated, if Helmi had on 25 December 1999 gone to SP1's shop, then SP11 and SP13 would have said so, but they did not. Neither did SP1 and his wife SP2 say that. All this shows that the accused had concocted the story.

D

[100] It does not matter even if the defence were to plead that the gratification was accepted not for the accused himself, but instead was accepted for the 'boss' of Helmi. Section 11(a) of the Act makes it an offence even if the agent corruptly accepts the gratification, not for himself, but 'for E any other person'.

[101] In *Public Prosecutor v Chan Kit Tong Sally* [1991] 1 MLJ 358; [1991] 1 CLJ 396 (Rep), the Supreme Court stated:

F

> Section 3(a)(i) clearly states that any person who corruptly receives any gratification 'for himself or for any other person' shall be guilty under the section.

[102] Section 3(a)(i) of the Prevention of Corruption Act 1961 has almost G similar wordings as s 11(a) of the Act.

[103] In *Public Prosecutor v Chan Kit Tong Sally*, the Supreme Court then went on to state in p 399:

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> In the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 the accused was found guilty of corruption under the Prevention of Corruption Act 1961 although the sum of RM250,000 which he had received from the Hong Kong and Shanghai Banking Corporation was not for his own personal benefit but was for the funds of UMNO.

I

[104] The trial judge was also correct to conclude that it is not probable for the accused to obey Helmi, who, according to the accused's own evidence, was ten years junior to the accused. The trial judges was of the view that the accused, being a senior, should not have to hand over the envelope to Helmi.

She also stated that it did not make sense for Helmi to tear the envelope and give the money to the accused if what the accused said is true, that the money was to be handed back to the 'boss'. I totally agree with the trial judge regarding this issue. The whole defence is a sham. It is illogical for Helmi to give the whole sum of RM2,000 to the accused for the purpose of buying fruits when initially the accused stated that Helmi asked him to accompany Helmi to collect something for the 'boss'.

[105] Notwithstanding the submissions of learned counsel for the accused, I am of the opinion that the trial judge was correct to say that the accused's going to SP1's shop on 29 December 1999 was a follow up of the initial raid on SP1's shop by the accused, Black, SP11 and SP13 on 25 December 1999. The accused knew about the demand for the money by the 'boss' on the phone together with Black. The accused also knew about the RM1,000 that was given to Black by SP1, and the balance to be paid by SP1 later.

[106] The trial judge therefore believed that on 29 December 1999, the accused had planned to collect the balance of payment from SP1. SP1 confirmed that the accused's voice was the same voice as the male person who called him several times to ask for the balance of the payment. The defence submitted that the sum to be paid was not recorded in the ACA's recording of the telephone conversations between SP1 and the male person of telephone No 019–3647456. That is a flaw in the prosecution case but it is not material. What is important is that SP1 recognised the recorded voice as that of the accused's voice. It was only subsequent to the telephone conversations with the male person on telephone No 019–3647456 that the accused came on the date and time arranged, ie 29 December 1999 at 3pm, to collect the RM2,000 from SP1. It is highly improbable that the accused did not know anything about the gratification being solicited for when he came to collect the money on 29 December 1999. What is even more telling is that after the accused accepted the envelope from SP1, he told SP1 to telephone him if anyone disturbs SP1. All this supports the trial judge's finding that the accused did commit the offence under the third charge.

[107] As for the submission of learned counsel that SP1 was an accomplice or agent provocateur, I do not think so. It is clear from the evidence that SP1 was the victim of the offence. In any case, under s 44(1)(a)(ii) of the Act, no witness shall be regarded as an accomplice by reason only of such witness having given or agreed to give any gratification. Under s 44(1)(b) and (c) of the Act, no agent provocateur shall be presumed to be unworthy of credit, and any statement made by an agent provocateur is admissible as evidence.

[108] As for SP11 and SP13, I am also of the opinion that they were not accomplices of the accused because they did not play an active role in the

commission of the office. Even if they did, and are held to be accomplices, their evidence is still admissible under s 44(1)(a)(iii) of the Act.

[109] Upon a maximum evaluation of the evidence in totality, I am satisfied that the trial judge had not misdirected herself or erred in fact and law in holding that the defence had not raised any reasonable doubt in the prosecution case to rebut it.

APPEAL AGAINST SENTENCE

[110] Regarding the appeal against sentence, I am of the opinion that the trial judge fully considered the plea in mitigation of the accused as follows:

(a) the accused is a first offender;

(b) the accused is married with three young children, and his wife is not working;

(c) the accused had been suspended from work and faces the risk of being dismissed from the PDRM service; and

(d) the accused is remorseful over his act.

[111] I am of the opinion that having weighed the above mitigating factors and public interest, the trial judge imposed a most adequate and appropriate sentence on the accused in respect of the third charge. I do not think that a sentence of 12 months imprisonment and a fine of RM10,000 in default six months imprisonment is manifestly excessive that it requires intervention by this court to reduce it. In fact, the accused is rather fortunate that the prosecution did not file a cross appeal regarding the sentence. Otherwise, I would have imposed a heavier custodial sentence. This is due to the deterrent sentences often imposed in corruption cases eg:

(a) in *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401, a former magistrate was sentenced to three years imprisonment; and

(b) in *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421, the accused was sentence to two years imprisonment.

[112] The accused in this case had committed a most despicable crime. He abused his position as a police officer to victimise and put fear into a disabled shopkeeper in order to obtain corruption money. If SP1 had really committed an offence by selling the fireworks and fire crackers, then he should be charged in court. The accused and Black should not be strutting around like little Napoleons, and demanding corruption money from their victims in the name of enforcement. Corruption is the most heinous crime which ought to

be wiped out so that business and trade in this country can flourish, and society can carry on its undertakings without being raided by police officers such as the accused. It would certainly improve Malaysia's ranking on the global corruption index if crimes of this nature can be totally eradicated.

[113] Based on the above, I dismissed the appeal of the accused and confirmed the sentence imposed by the trial judge regarding the third charge.

[114] The accused did not apply for stay of execution. He commenced serving his sentence of imprisonment with effect from 30 September 2009.

Accused's appeal dismissed.

Reported by Kanesh Sundrum